

# (Why) Is International Law Important for Judges in Indiana?

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# Overview

- Introduction to 5 Issues (Potentially) Covered by Int'l Law
  - Rules on Jurisdiction
  - Procedural Rules
  - Rules on the Applicable (Substantive) Law
  - Substantive Law Itself
  - Rules on Recognition and Enforcement of Foreign Documents and Judgments
- 5 Areas of Law
  - Trade and Business Transactions
  - Family Law
  - Human Rights
  - Wills, Trusts and Estates
  - International Judicial Assistance
- In Each Area
  - Important International Conventions
  - Conventions Applicable in the U.S.
  - Impact of the Latter Conventions in Practice: Examples and Typical Problems
- Recommended Sources of Information and Suggestions for Citation of Int'l and Foreign Materials

# A Remark Before We Get Going...

- Good Reasons Why **YOU** Should Apply International Law
  - Because it is binding in the United States (ratified conventions, customary int'l law), or
  - Because the parties to a contract have chosen it as the law governing the contract, or
  - Because the case at hand is not covered by any binding rules of law while certain norms of international or foreign law can provide useful inspiration for the resolution of the case in an equitable and just manner
- Good Reasons Why You Should **NOT** Apply International Law
  - None ! (lack of knowledge is not exactly a good reason...)

# What Kind of “International” Law Are We Talking About?

- Inter-national law proper = law between nations
  - Bi-lateral or multi-lateral agreements = conventions  $\approx$  sort of int'l statutory law
  - Customary international law  $\approx$  sort of int'l case law
- Foreign law = law applicable in other countries but as such not binding in the U.S.

# Who Makes This “International Law”?

- There is no “international” legislature
- Int’l law is created by consensus of sovereign states
- Int’l law comes in 3 main forms
  - Bilateral or multilateral agreements = int’l conventions
  - Customary international law = state practice with *opinio iuris*
  - General principles of law
- Besides states getting together directly, there are int’l organizations facilitating or drafting conventions, such as
  - the UN Commission on Int’l Trade Law UNCITRAL
  - the Hague Conference on Private Int’l Law
  - the Int’l Institute for the Unification of Private Int’l Law UNIDROIT

# How / Why Does Int'l Law Become Binding in the National Legal Order?

- Since int'l law is based on consensus, it generally does not becoming binding on any state unless accepted by that state
- Acceptance is generally expressed via "ratification"
- In the U.S. "[the President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur..." (Art. II Sec. 2 (2) U.S. Constitution)
- In the U.S., treaties are self-executing if they are unconditional and sufficiently clear and precise, unless otherwise stipulated

# What Kind of Rules Can We Find in “International Law”?

1. Rules on Jurisdiction = Which Courts Should Deal With a Case?
2. Rules on Procedure (after jurisdiction is established)
3. Rules on the Applicable Law
4. Substantive Rules of Law
5. Rules on Recognition and/or Enforcement of Foreign Legal Documents or Judgments

# What Kind of Rules Can We Find in “International Law”?

## 1. Rules on Jurisdiction = Which Courts Should Deal With a Case?

- Rules on exclusive jurisdiction, e.g. for cases dealing with real estate
- Rules on special jurisdiction, e.g. for employment contracts, consumer contracts or family support/maintenance
- Rules on other (statutory) bases of jurisdiction, in particular jurisdiction based on domicile
- Rules on choice of forum, i.e. selection of the court by the parties to the dispute
- Rules on conflicts, i.e. if more than one court with jurisdiction is approached about the same issues (->lis pendens)



## ■ A few more words about jurisdiction...

- Unless there is an exclusive jurisdiction for a case, there may well be more than one possible court to deal with it
- Absent an exclusive jurisdiction (based on law or party agreement), the plaintiff can always bring a suit in the court district where the defendant is domiciled
- Additional options could be: i) the court district where the plaintiff is domiciled, e.g. for a claim arising from a consumer contract; ii) the court district where the characteristic obligation under a contract had to be fulfilled; iii) the court district where a tort was committed and the court district where the injury occurred; iv) etc.
- This may give the plaintiff a choice of forum -> forum shopping
- However, not every court that has jurisdiction has to or will accept every case -> forum non conveniens
- If a court accepts a case, later seized courts should give priority to the first seized court -> lis pendens
- Rules on jurisdiction can be found either in federal or state law or in int'l conventions or in all of the three

## ■ Jurisdiction of YOUR Courts

- The plaintiff makes the first move by approaching a chosen court.
- Generally, it is up to each country whether it will allow its courts to take a case.
- Different countries require different degrees of connection with the parties, in particular with the defendant, before imposing their jurisdiction.
- European countries are bound by the Brussels and Lugano Conventions on Jurisdiction in Civil and Commercial Matters.
- Europe and the U.S. have negotiated a global convention, which has not entered into force as yet, however.
- For the time being, U.S. and Indiana law determine jurisdiction in cases with foreign elements. The approach is generally a generous one, i.e. almost any case can be brought here, as long as there is some connection to the U.S. -> may cause problems with "extra-territorial" reach

# What Does This Mean in Practice?

- i) **Int'l law:** Active and passive personality principle, territoriality principle, world law principle
- ii) **Personal jurisdiction:** 'due process' requires only 'minimum contacts'
  - P.J. is governed by state law for both state and federal courts
  - In private law cases, the test is residence or domicile
  - In commercial cases the "doing business" standard is applied, looking in particular at solicitation for business and/or supply of goods or services, but also at presence of offices or agents, real estate, bank accounts, etc.
- iii) **Subject matter jurisdiction:** state courts, except alienage jurisdiction (+ over 75,000\$, 28 USC § 1332) or federal question jurisdiction (bankruptcy, etc.)
- iv) **Venue:** i) place of residence of defendant; ii) place where claim arose; iii) place of residence of plaintiff; iv) venue chosen by plaintiff
- v) **Extraterritorial Jurisdiction** -> effects doctrine (e.g. in antitrust cases)
- vi) **Foreign sovereign immunity:** the Foreign Sovereign Immunities Act binds federal and state courts; it has exceptions if immunity was waived (implicitly), for commercial activities, for tortious acts, and certain other cases

## ■ Consequences of proceedings in an inconvenient or wrong jurisdiction

- The case should be refused if exercise of jurisdiction over the defendant would be 'unreasonable'
- If the case is accepted, it must be properly served on the foreign defendant ('due process' guarantees a real opportunity to defend)
- If the foreign defendant appears before the court and defends itself on the merits, jurisdiction is established
- However, the foreign defendant may appear before the court just to contest jurisdiction
- If the court confirms jurisdiction, the foreign defendant may defend on the merits while reserving the question of jurisdiction for appeal

# What Kind of Rules Can We Find in “International Law”?

## 2. Rules on Procedure (after jurisdiction is established)

- Rule of Thumb: A Court = Forum always applies *its own* procedural law, which may however include procedural rules from int’l conventions binding upon the forum state

## ■ Typical procedural issues

- Rules governing service of process
- Rules regarding simultaneous proceedings in more than one country
- Rules on interlocutory relief
- Rules on taking of evidence
- Rules on enforcement of judgments

# What Kind of Rules Can We Find in “International Law”?

## 3. Rules on the Applicable Law

- Sometimes also called “Choice of Law”
- Rule of Thumb: A Court = Forum does NOT always apply its own substantive law = *lex fori*
- It either applies its national substantive law, which may however include modifications from int’l conventions binding upon the forum state
- Or it applies substantive international conventions that displace the national law, except for limited areas where they are not providing complete sets of rules
- Or it applies a foreign law altogether, again with possible modifications from int’l conventions



## ■ How is the substantive law “chosen”?

- Step 1: Have the parties made a valid choice of law
  - Either for a specific foreign law
  - Or for a specific int’l convention or a specific int’l model law or set of principles (Unidroit, Lando...)
- Step 2: Is there a binding rule that – in the absence of a valid choice by the parties – an int’l convention must be applied rather than national law, e.g. the CISG?
- Step 3: if there is neither a valid party choice of a different substantive law nor the mandatory application of an int’l convention, the court should apply the lex fori, i.e. Indiana and U.S. law



# What Kind of Rules Can We Find in “International Law”?

## 4. Substantive Rules of Law

- Rule of Thumb: International Law generally does not provide a complete set of substantive law rules. Therefore, substantive law rules in int’l conventions are normally just the “modifications” of the applicable national law mentioned above.
- However, some int’l conventions provide almost complete sets of substantive rules, leaving only very limited scope of application for the national law of the forum state or whatever national law is applicable otherwise
- Both will be discussed below for 5 areas of law

# What Kind of Rules Can We Find in “International Law”?

## 5. Rules on Recognition and/or Enforcement of Foreign Legal Documents or Judgments

- These are not really cases that have come before you for decision. Rather, the decisions have been taken elsewhere and now they need to be applied or enforced in Indiana.
- Domestic law equivalent: Full Faith and Credit Clause (Art. IV Sec. 1 of the U.S. Constitution)
- However, the full faith and credit clause does not apply to foreign judgments and states are free to adopt their own rules for recognition of foreign judgments.
- Rule of Thumb: Foreign judgments are enforced without review on the merits. BUT courts do review the following:
  - i) jurisdiction = competence of the foreign court;
  - ii) proper service and proceedings = opportunity to defend;
  - iii) no problems of fraud or prejudice or other violation of U.S./Indiana public policy

# Trade and Business Transactions

# Trade and Business Transactions: Conventions Binding for the U.S.

- 1980 United Nations Convention for the International Sale of Goods (CISG)
- 1974 Convention on the Limitation Period in the International Sale of Goods
- 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
- 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID)
- 1975 OAS Inter-American Convention on International Commercial Arbitration
- 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

# Cont'd

- Numerous rules in multilateral trade agreements, in particular in the WTO agreements, in the NAFTA agreement, and in customs cooperation agreements
- Numerous agreements on the protection of IP-Rights
- Numerous bilateral investment protection agreements
- Principles and rules of the lex mercatoria to fill gaps in int'l commercial contracts
- Incoterms as codified elements of the lex mercatoria

# Trade and Business Transactions: Conventions Considered for Ratification

- 1988 Unidroit Convention on International Financial Leasing
- 1988 Unidroit Convention on International Factoring
- 1988 United Nations Convention on International Bills of Exchange and International Promissory Notes
- 1995 United Nations Convention on Independent Guarantees and Stand-by Letters of Credit

# Trade and Business Transactions: Other Important Conventions

- 1978 United Nations Convention on the Carriage of Goods by Sea
- 1989 OAS Convention on the International Carriage of Goods by Road
- 1994 Unidroit Principles of International Commercial Contracts
- 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects
- Numerous UNCITRAL Model Laws and Rules

# Let's Take a Closer Look

- The 1980 UN Convention for the Int'l Sale of Goods (Vienna Convention or CISG)
  - This is by far the most important int'l convention for IBT in the U.S.
  - It automatically governs “contracts of sale of goods between parties whose places of business are in different States [provided both] States are Contracting States [of the CISG]” – unless its application is excluded by agreement of the parties (malpractice !)



# Let's Take a Closer Look – the CISG

## Part I – Sphere of Application and General Provisions

- Chapter 1: Sphere of Application
- Chapter 2: General Provisions

## Part II – Formation of the Contract

## Part III – Sale of Goods

- Chapter 1: General Provisions
- Chapter 2: Obligations of the Seller
  - - Delivering the Goods and Handing Over of Documents
  - - Conformity of the Goods and Third Party Claims
  - - Remedies for Breach of Contract by the Seller
- Chapter 3: Obligations of the Buyer
  - - Payment of the Price
  - - Taking Delivery
  - - Remedies for Breach of Contract by the Buyer
- Chapter 4: Passing of Risk
- Chapter 5: Provisions Common to the Obligations of the Seller and of the Buyer
  - - Anticipatory Breach and Installment Contracts
  - - Damages
  - - Interest
  - - Exemptions
  - - Effects of Avoidance
  - - Preservation of the Goods

## Part IV – Final Provisions

# Let's Take a Closer Look

## ■ WTO and NAFTA

- The WTO Agreements are not self-executing in the U.S.
- They provide inter-state dispute settlement mechanisms in Geneva
- NAFTA rules can potentially be applied in U.S. courts
- NAFTA also provides international dispute settlement mechanisms, including for private applicants
- Some remarks about substantive coverage...

# Let's Take a Closer Look

## Unidroit and European Principles

- Both are sets of substantive contract law and can be used by parties via choice of law, binding the courts
- The European Principles are the most modern contract law in the world, with a bit of a European tilt
- The Unidroit Principles are very modern as well and more global
- Unfortunately, neither set provide full coverage, requiring a fall-back option
- More and more academics argue that the Unidroit Principles are a codification of the *lex mercatoria*. Unfortunately, the courts have not yet (broadly) endorsed this view.

# Let's Take a Closer Look - Incoterms

## Origin Terms

**EXW** - Ex-Works, named place where shipment is available to the buyer, not loaded. The seller will not contract for any transportation.

## International Carriage NOT Paid by Seller

**FCA** - Free Carrier, unloaded at the seller's dock OR a named place where shipment is available to the international carrier or agent, not loaded. This term can be used for any mode of transport.

**FAS** - Free Alongside Ship, named ocean port of shipment. Ocean shipments that are NOT containerized.

**FOB** - Free On Board vessel, named ocean port of shipment. This term is used for ocean shipments only where it is important that the goods pass the ship's rail.

## International Carriage Paid by the Seller

**CFR** - Cost and Freight, Named ocean port of destination. This term is used for ocean shipments that are not containerized.

**CIF** - Cost, Insurance and Freight, named ocean port of destination. This term is used for ocean shipments that are not containerized.

**CPT** - Carriage Paid To, named place or port of destination. This term is used for air or ocean containerized and roll-on roll-off shipments.

**CIP** - Carriage and Insurance Paid To, named place or port of destination. This term is used for air or ocean containerized and roll-on roll-off shipments.

## Arrival at Stated Destination

**DAF** - Delivered At Frontier, named place of destination, by land, not unloaded. This term is used for any mode of transportation but must be delivered by land.

**DES** - Delivered Ex-Ship, named port of destination, not unloaded. This term is used for ocean shipments only.

**DEQ** - Delivered Ex-Quay, named port of destination, unloaded, not cleared. This term is used for ocean shipments only.

**DDU** - Delivered Duty Unpaid, named place of destination, not unloaded, not cleared. This term is used for any mode of transportation.

**DDP** - Delivered Duty Paid, named place of destination, not unloaded, cleared. This term is used for any mode of transportation.

## Transport obligations, costs and risks

With the compliments of:



### Critical points

### Group E

#### Departure

Under EXW, the seller minimizes his risk by only making the goods available at his own premises



- Carriage to be arranged by the buyer
- Risk transfer from the seller to the buyer when the goods are at the disposal of the buyer
- Cost transfer from the seller to the buyer when the goods are at the disposal of the buyer

### Group F

#### Main carriage not paid by seller

Under F Terms, and under FCA unless otherwise agreed, the seller arranges and pays for the pre-carriage in the country of export



- Carriage to be arranged by the buyer or by the seller on the buyer's behalf
- Risk transfer from the seller to the buyer when the goods have been delivered to the carrier at the named place
- Cost transfer from the seller to the buyer when the goods have been delivered to the carrier at the named place



- Carriage to be arranged by the buyer
- Risk transfer from the seller to the buyer when the goods have been placed alongside the ship
- Cost transfer from the seller to the buyer when the goods have been placed alongside the ship



- Carriage to be arranged by the buyer

# Family Law



# Family Law

## Conventions Binding for the U.S.

- 1980 Hague Convention on the Civil Aspects of International Child Abduction

# Family Law

## Conventions Considered for Ratification

- 1993 Hague Convention on Inter-country Adoption
- 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation for the Protection of Children
- 1999 Hague Convention on the International Protection of Adults



# Family Law

## Other Important Conventions

- 1956 United Nations Convention on International Family Support
- 1956 Hague Convention on the Law Applicable to Maintenance Obligations Toward Children
- 1958 Hague Convention Concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations Toward Children
- 1973 Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations
- 1973 Hague Convention on the Law Applicable to Maintenance Obligations

# Human Rights

# Human Rights

## Conventions Binding for the U.S.

- Human Rights as *ius cogens*
- 1945 Charter of the United Nations, with Statute of the International Court of Justice
- 1948 Universal Declaration of Human Rights
- 1948 Convention on the Prevention and Punishment of the Crime of Genocide
- 1949 Geneva Convention Relative to the Treatment of Prisoners of War
- 1965 International Convention on the Elimination of all Forms of Racial Discrimination
- 1966 International Covenant on Civil and Political Rights
- 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- 1928 Convention Between the American Republics Regarding the Status of Aliens

# Human Rights

## Conventions Binding for the U.S.

- 1999 ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor
- 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
- 2000 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography

# Human Rights

## Other Important Conventions

- 1951 Geneva Convention Relating to the Status of Refugees
- 1960 Convention Against Discrimination in Education
- 1966 International Covenant on Economic, Social and Cultural Rights
- 1979 Convention on the Elimination of all Forms of Discrimination Against Women
- 1989 Convention on the Rights of the Child
- 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
- 1998 Declaration on Fundamental Principles and Rights at Work
- 1998 Rome Statute of the International Criminal Court
- 1999 Worst Forms of Child Labour Convention

# Human Rights

## Important Regional Conventions

- 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms
- 1969 Inter-American Convention on Human Rights
- 1985 Inter-American Convention to Prevent and Punish Torture

# Wills, Trusts and Estates

# Wills, Trusts and Estates Conventions Binding for the U.S.

- none



# Wills, Trusts and Estates

## Conventions Considered for Ratification

- 1985 Hague Convention on the Law Applicable to Trusts and on Their Recognition
- 1989 Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons
- 1973 Unidroit Convention Providing a Uniform Law on the Form of an International Will

# International Judicial Assistance

# What Is “International Judicial Assistance”?

- discuss

# International Judicial Assistance Conventions Binding for the U.S.

- 1961 Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents
- 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters
- 1970 Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters
- 1975 OAS Inter-American Convention on Taking Evidence Abroad
- 1992 Inter-American Convention on Mutual Assistance in Criminal Matters

# International Judicial Assistance Conventions Considered for Ratification

- 1999 Hague Convention on Jurisdiction and the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters

# International Judicial Assistance

## Other Important Conventions

- 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters
- 1980 Rome Convention on the Law Applicable to Contractual Obligations

# Let's Take a Closer Look

- 1999 Hague Convention on Jurisdiction and the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters
  - Overview of coverage and substance – if we have time



# Some Useful Sources for Additional Information: American Sources

- The official U.S. government database of treaties in force for the U.S. <http://www.state.gov/s/l/treaties/c15824.htm>
  - 356 pages of bilateral treaties, listed by country (in alphabetical order)
  - 175 pages of multilateral treaties, listed by topic (with lists of states parties)
- The website of the Office of the Legal Advisor at the U.S. Department of State with all kinds of useful info on int'l law <http://www.state.gov/s/l/>
- The American Society of International Law <http://www.asil.org/index.html>
- The Electronic Information System for International Law <http://www.eisil.org/index.php?sid=297648529&t=index>
- The Electronic Library on Int'l Commercial Law and the CISG (with extensive case law) <http://www.cisg.law.pace.edu/>

# Some Useful Sources for Additional Information: International Sources

- Website of the European Union:  
<http://europa.eu.int/>
- Website of the WTO: <http://www.wto.org/>
- United Nations Commission on International Trade Law (UNCITRAL): <http://www.uncitral.org/>
- Website of the International Institute for the Unification of Private Law (Unidroit):  
<http://www.unidroit.org/>
- Website of the Hague Conference on Private International Law:  
[http://www.hcch.net/index\\_en.php?act=home.splash](http://www.hcch.net/index_en.php?act=home splash)
- Website of the International Chamber of Commerce: <http://www.iccwbo.org/>

# Suggestions for Citation of International and Foreign Materials

- EJLR Guide for Authors